

App. F. IX-4

Previous References

1937-38

(CB)

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Serial No. 3

Letter References.

P-33

GENERAL AND REVENUE SECRETARIAT.

Serial No. 3

Part B for Sept. 1937

SUBJECT.

Supplementary report of the Sub
Committee of the Constitution Committee
of the Chamber of Princes on the implications
of the section of the Govt. of India Act, 1935,
which are applicable to the Indian States

CB 4985



CB 40-37-3

DEWAN'S OFFICE
23 SEPT. 1937
No. 2129

Vasantha Mahal,
Mysore,

22nd September 1937.

C. 345
Encls.

OFFICE OF THE
SECOND MEMBER OF COUNCIL.
25 SEPT. 1937
NO. 2418

Dear Mr. Kesavaiengar,

I am desired to forward herewith for favour of disposal two circulars dated the 7th September 1937, from His Highness the Chancellor of the Chamber of Princes, the first enclosing a copy of the supplementary report of the Sub. Committee of the Constitution Committee of the Chamber of Princes on the implications of the sections of the Government of India Act, 1935, which are applicable to the Indian States, and the second forwarding a copy of an opinion on the India and Burma (Trade Regulation) order 1937 by the Honourable Mr. William H. Wadhams.

Yours sincerely,

Goddard

For perusal

Dewan
1st member
2nd member

MS
23/9

MS
23-9-37

BV.

102
24/9

MS
25/9/37

MS
25/11

B

3
Circular No. 16.

Chail View Palace,
Kandaghat.
7th Sept. 1937.

Your Highness,

The report of the Sub-Committee of the Constitution Committee of the Chamber of Princes on Implications of the Sections of the Government of India Act, 1935, applicable to the Indian States was under my instructions circulated on the 19th April, 1937, to all the Members of the Chamber. The Sub-Committee has submitted a supplementary report on the subject and I enclose a copy of it for Your Highness' perusal.

Yours sincerely,

BHUPINDRA SINGH

Maharajadhiraj of Patiala,
Chancellor, Chamber of Princes.

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REPORT

(Supplementary)

OF THE

Sub-Committee of the Constitution Committee of the Chamber of Princes

ON

**Whether the Second Schedule Annexed to
the Act precludes Amendment
of all Sections of the Act
which may affect a
Federated State.**

DELHI
August 1937.

**AS TO WHETHER THE SECOND SCHEDULE ANNEXED TO
THE ACT PRECLUDES AMENDMENT OF ALL SECTIONS
OF THE ACT WHICH MAY AFFECT A FEDERATED
STATE.**

The Committee report that they have examined the Second Schedule and find that the following Sections are subject to amendment without affecting the Instrument of Accession:

4, 7(3), 9(1) & (2), 10(3) (4) & (5), 11, 12 (1) (c) (d) (e) & (f), and 12(2), 15, 16, 17(1) (2) (3) & (5), 18(1) (3 partly), (4) & (5), 19, 20, 21, 22, 23, 24, 25(1 partly) (2) & (3), 26 partly, 27, 28, 29, 33(3) (a) (b) (c) (d) (e partly) (g) (h) & (i partly) & 33(4), 35, 38(1) (c) (d) (i) (ii) & (iii), 38(3) & (4), 39, 40(2), 41, 42, 46, 47, 48, 49, 50, 51, 52(1) (a) (b) (c) (d) & (e), & 52(2), 52(3), 53, 55, 56, 57, 58, 59, 60 to 83, 84(1), (a) (b) (c) (d) (i) (ii), 84(2) (3) (4), 85, 86(2), 87, 88 to 98, 99(1), 99(2) (a) (b) & (e partly), 100, 102, 103, 105, 106(3) 107(1) & (2), 108(1) (a) (b) (d) (e) (f) (g), 108(2) & (3), 109, 111 to 120, 122(2), 123, 124(2), 126 (1) (2) (3) (4), 127, 135, (with the exception of the last paragraph), 158, 159, 160, 161, 162, 163, 165, 166(3), 167, 168, 169, 170, 171, 172 to 180 (save as it affects suits against Federation by a Federated State) 181 (3), 183(3) & (4), 185, 186, 187, 188, 189, 190, 191, 192, 193(1), 195 (1) & (3), 197, 198, 199, 205, 206, 215, 219 to 231 232 to 277, (with the exception of Sections 262(1), 272 to 284, 287, 288 to 292, 293 (except the proviso), 295, 296, 297, 298, 299, 300, 301 to 307, 309, 310, 311 (excepting the provisions relating to the interpretation of this Act which may not be amended without affecting the accession of a State. This would authorize the amendment of the definitions in Section 311 of "British India," "Burma," "British Burma," "Tribal areas," "corresponding Province," "Local Government," "Provincial Act" and "Provincial Law"), 311(6), 312 to 319, and 320 to 476 (Burma now excluded from the Act).

1st Schedule. Part 1. (Representatives of British India in the Federal Legislature).

3rd Schedule. (Provisions as to Governor-General and Governors of Provinces).

4th Schedule. (Forms of oaths or affirmations) save with respect to the oath or affirmation by the Ruler or subject of an Indian State.

5th Schedule. (Composition of Provincial Legislatures).

6th Schedule. (Provisions as to Franchise).

7th Schedule. (Legislative Lists: as to matters not accepted by a State, as matters with respect to which the Federal Legislature may make laws for that State).

8th Schedule. (Federal Railway authority).

9th Schedule. (Provisions of Government of India Act continued in force with Amendments until the establishment of the Federation).

10th, 11th, 12th, 13th, 14th, & 15th Schedules. (with respect to Burma) now excluded from the Act.

16th Schedule. (enactments repealed) now 10th Schedule.

Most of these Sections refer exclusively to British India and the Governors' Provinces.

The amendment of certain of them however, would affect a Federated State. Attention is called to the following Sections **which concern Indian States** but which by the terms of Section 6 (5) and the Second Schedule annexed to the Government of India Act **are amendable** without affecting the accession of a State :

Section 38 (1) (c).—This Section provides: "The Governor-General shall in his discretion, after consultation with the President or the Speaker, as the case may be, make rules—

"For prohibiting the discussion of, or the asking of questions on any matter connected with any Indian State, other than a matter with respect to which the Federal Legislature has power to make laws for that State, unless the Governor-General in his discretion is satisfied that the matter affects Federal interests or affects a British subject, and has given his consent to the matter being discussed or the question being asked."

Similar provision with respect to rules by the Governor of a Province which are found in Section 84(1) (c) may also be amended.

Section 40(2).—This Section provides: "If the Governor-General in his discretion certifies that the discussion of a Bill introduced or proposed to be introduced in the Federal Legislature, or of any specified clause of a Bill, or of any amendment moved or proposed to be moved to a Bill, would affect the discharge of his special responsibility for prevention of any grave menace to the peace or tranquillity of India or any part thereof, he may in his discretion direct that no proceedings, or no further proceedings, shall be taken in relation to the Bill, clause or amendment, and effect shall be given to the direction."

The authority given by this Section to the Governor-General to direct that no proceedings or no further proceedings shall be taken with respect to a Bill which would affect the discharge of special responsibility for the prevention of any grave menace to the peace or tranquillity of India may be amended, although Section 12(1) (a) imposing upon him a special responsibility in this matter is not amendable.

Section 106(3).—This Section provides for the implementing of the treaties and by (c) gives the Federal Legislature power to implement a law which the Federal Legislature has power to make for a Federated State;

Section 108(1).—Provides: "Unless the Governor-General in his discretion thinks fit to give his previous sanction, there shall not be

introduced into, or moved in, either Chamber of the Federal Legislature any Bill or amendment which—(f) subjects persons not resident in British India to greater taxation than persons resident in British India or subjects companies not wholly controlled and managed in British India to greater taxation than companies wholly controlled and managed therein.

This Section (although the protection it affords is not a legal guarantee inasmuch as it is to be exercised by the Governor-General in his discretion) was stressed by the Special Representatives of His Excellency as a guarantee against discrimination. Much of its value as such a protection is, however, lost by reason of the fact that it is one of the Sections which may be amended by Parliament. The fact that it may be so amended is an additional reason for pressing for the acceptance of General Limitation (a) against discrimination in the first Schedule proposed by the Constitutional Committee.

Section 193(1).—This Section provides: "It shall be the duty of the authority and every Federated State so to exercise their powers in relation to the railway with which they are respectively concerned as to afford all reasonable facilities for the receiving, forwarding, and delivering of traffic upon and from those railways, including the receiving, forwarding and delivering of through traffic at through rates, and as to secure that there shall be between one railway system and another no unfair discrimination, by the granting of undue preferences or otherwise, and unfair or uneconomic competition."

This Section, it may be noted, provides against unfair discrimination both by the Railway Authority and every Federated State. The omission to protect this Section in the Second Schedule appears to be an oversight.

Section 195(1) and (3)—This Section provides: "(1) The Governor-General acting in his discretion shall make rules requiring the Authority and any Federated State to give notice in such cases as the rules may prescribe of any proposal for constructing a railway, or for altering the alignment or gauge of a railway and to deposit plans.

(3) This section shall not apply in any case where the Governor-General in his discretion certifies that for reasons connected with defence effect should or should not, be given to a proposal,

It will be noted that Section 195(2) as it refers to the Railway Tribunal is included in the protected sections in the Second Schedule. The purpose of the omission of Sections 195(1) and (3) is not apparent. Their inclusion among the protected sections may have been intended as being within the phrase "the conduct of business between the authority and the Federal Government."

Section 215.—This Section provides: The Federal Legislature may make provision by Act for conferring upon the Federal Court such supplemental powers not inconsistent with any of the provisions of this Act as may appear to be necessary or desirable for the purpose of enabling the court more effectively to exercise the jurisdiction conferred upon it by or under this Act.

The reason for the omission of this Section from the Second Schedule is also not clear. If Item 55 of the Federal Legislative List in so far as it relates to the conferring of supplemental powers on the Federal Court is accepted by a Federated State as recommended in this report, Section 215 should also be included among the safeguarded sections in the Second Schedule of the Act.

Section 287.—This Section provides: "Arrangements may be made between His Majesty's Representative for the exercise of the functions of the Crown in its relations with Indian States and the Governor of any Province for the discharge by the Governor and officers serving in connection with the affairs of the Province of powers and duties in connection with the exercise of the said functions of the Crown."

Although this section may affect an Indian State it is not of special importance that it should be included in the protected sections in the Second Schedule of the Act as it refers to Crown functions.

Section 297.—This Section provides: "(1) No Provincial Legislature or Government shall—

(a) by virtue of the entry in the Provincial Legislative List relating to trade and commerce within the Province, or the entry in that list relating to the production, supply, and distribution of commodities, have power to pass any law or take any executive action prohibiting or restricting the entry into, or export from, the Province of goods any class or description or

(b) by virtue of anything in this Act have power to impose any tax, cess, toll, or due which, as between goods manufactured or produced in the Province and similar goods not so manufactured or produced, discriminates in favour of the former, or which, in the case of goods manufactured or produced outside the Province, discriminates between goods manufactured or produced in one locality and similar goods manufactured or produced in another locality.

(2) Any law passed in contravention of this Section shall, to the extent of the contravention, be invalid.

Sub-Section 1(a) prohibits a Province from prohibiting the entry into a Province of goods of any class or description from a State or the export of such goods from a Province to a State and

(b) prohibits discrimination by a Province in favour of its goods against similar goods manufactured in a State or which discriminates between goods of different States or Provinces.

Its value as a safeguard against discrimination is, however, defeated. This Section is not among the protected provisions and the Section is therefore, amendable by Parliament. The fact that this Section is amendable is also an additional argument in favour of the inclusion in the First Schedule annexed to the Instrument of Accession of the General Limitation (a) against discrimination proposed by the Constitutional Committee

It may also be pointed out that **Section 99(1)** which provides :

“Subject to the provisions of this Act, the Federal Legislature may make laws for the whole or any part of British India or for any Federated State, and a Provincial Legislature may make laws for the Province or for any part thereof.”

And **Section 100(1)** which provides:

“Notwithstanding anything in the two next succeeding subsections, the Federal Legislature has, and a Provincial Legislature has not, power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule to this Act (hereinafter called the “Federal Legislative List”) are not among the protected Sections. As these Sections confer powers on the Federal Legislature to enact laws for a Federated State, they affect a State and should properly also have been included in the Second Schedule of the Act.

It is suggested that the Second Schedule of the Act should be amended to include among the protected provisions all the omitted Sections of the Act which affect a Federated State.

The Committee is indebted to Colonel Zorawar Singh of Panna for the list of Sections which may be amended without affecting the accession of a State.

The Committee also express their appreciation to Mr. V. M. Pawar, Junior, of Dewas a Member of this Committee, and to Judge Wadhams, who attended its sessions as legal adviser, for the preparation of this report.

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OPINION

BY

**Honourable William H. Wadhams,
Counsellor-at-Law, Legal Adviser
to the Chamber of Princes,
on the India and Burma
(Trade Regulation)
Order 1937.**

***DELHI,
August, 1937.***

OPINION

BY HONOURABLE WILLIAM H. WADHAMS,
COUNSELLOR-AT-LAW, LEGAL ADVISER TO THE
CHAMBER OF PRINCES, ON THE INDIA AND BURMA
(TRADE REGULATION) ORDER, 1937.

The India and Burma (Trade Regulation) Order, 1937 has been issued by the King's Most Excellent Majesty in Council.

The Legal Adviser to the Chamber of Princes has been notified that "Several States have been addressed by the Political Department of the Government of India with a view to finding out if they desire to be included in the scope of the agreement in connection with the India and Burma (Trade Regulation) Order, 1937. They have been further requested to suggest the adaptations and modifications of Part II of the Order which in their opinion should be provided for as far as they are concerned."

An opinion has been requested by the Chamber of Princes as to the scope of the Order and "as to what reservations and modifications should generally be put forward by the States to serve and safeguard their interests".

Before discussing the acceptance or modification of the Order in Council, a Synopsis of its text with comments will aid in showing its scope and its application to Indian States.

In the Synopsis, Counsel has not always followed the exact text of the Order, but has transposed and abbreviated for the purpose of clarity and brevity.

SYNOPSIS OF AND COMMENTS ON THE INDIA AND (TRADE REGULATION) ORDER 1937.

THE RECITAL.

The Recital states that the Order is made in the exercise of powers conferred on His Majesty by Section 160 of the Government of India Act, 1935, and Section 135 of the Government of Burma Act, 1935.

Comment.

These sections are identical in language: both provide that His Majesty may, by Order in Council, give directions "with a view to preventing undue disturbance of trade between India and Burma,* and with a view to safeguarding the economic interest of Burma during the period immediately following the separation of India and Burma."

* Note.—The copy of the text of the Order submitted to Counsel reads: "with a view to safeguarding the separation of India and Burma" instead of "with a view to preventing undue disturbance of trade between India and Burma."

Although Section 160 of the Government of India Act and Section 135 of the Government of Burma Act both authorise His Majesty by Order-in-Council to give directions with respect to the duties to be levied on goods imported to or exported from India or Burma, such authority does not extend to the Indian States for the reason that Indian States are not within the jurisdiction of Parliament. Such also appears to be the view of the Government of India from the enquiry of the Political Department addressed to Indian States as to whether they desire to be included in the scope of the Order and the request that they suggest adaptations and modifications which in their opinion should be provided for as far as they are concerned.

PART I. INTRODUCTORY AND GENERAL.

Part I Provides :

Section 1. The title by which the Order may be cited as "The India and Burma (Trade Regulation) Order 1937.

Section 2. The Interpretation Act of 1889 applies.

Section 3. Definition of "duty," "import duty" and "separation" meaning the separation of India and Burma.

Section 4. Questions whether goods have been produced or manufactured in any country shall be determined by the same tests as are applicable for customs purposes in India.

Section 5. Disputes between the Governor General of India and the Governor of Burma as to the interpretation and application of the Order, including whether any consent requisite under the Order has been unreasonably withheld, shall be referred to the Secretary of State and his decision shall be final.

Comment.

After the establishment of Federation, the Federal Court will have jurisdiction to determine any dispute to which a State is a party concerning the interpretation of the Order in Council provided the dispute is with the Federation, a Province or a Federated State and involves a question on which the existence or effect of a legal right depends (Sec. 204(1) (a), Govt. of India Act 1935), but disputes between the Governor General of India and the Governor of Burma as to the interpretation or application of the Order are to be determined by the Secretary of State, whose decision is final.

Should the Ruler of an **Indian State** accept the Order as applicable to his State, any dispute with the Governor of Burma as to the interpretation or

application of any of the provisions of the Order would be determined by the Secretary of State.

Section 6. Reference to any Act shall refer to Acts for the time being in force in India and Burma.

Section 7. The Order comes into force on separation and its duration is limited to three years or until twelve months after notice given by the Governor General of India to the Governor of Burma, or by the Governor of Burma to the Governor General of India, whichever is the longer period.

Comment.

Section 160 of the Government of India Act and Section 135 of the Government of Burma Act, which are the authority for the Order in Council, indicate that such Order is limited to the period immediately following separation.

The Order is therefore temporary. The maximum time which it could be in force appears to be four years from the date of the separation of Burma and India. The minimum period is three years unless the section authorises a shorter period by notice.

The construction is not free from doubt.

If the familiar rule of construction that a qualifying adjective or phrase is deemed to refer to the last preceding subject matter is applied, the qualifying phrase at the end of the section "whichever is the longer period" refers to the periods in the notices which may be given by the Governor General of India and the Governor of Burma.

If this construction of the section is correct, either the Governor General of India or the Governor of Burma could extend the duration of the Order for a longer period than three years, or could shorten its duration to less than three years. In case both of the Governors give notice, naming different dates for the termination of the Order, it would terminate on the later of the two dates, that being the notice which provides "the longer period."

If such is not the construction, but the "longer period" referred to is either the three-year period or the period fixed by notice, then either the Governor General of India or the Governor of Burma would have the power to extend the period of the Order beyond three years, but could not shorten its duration to less than three years in any case.

The maximum extension possible would be a year, for should either Governor give notice on the last day before the three years period expired, the Order would thereby only be extended for an additional twelve months.

PART II. PROVISIONS AS TO BRITISH INDIA.

Part II provides:

Section 1.

Except as otherwise provided in this Order, no duty shall be levied in British India on goods imported from or exported to Burma, in excess of the duties, if any, which are so leviable immediately before separation.

Exceptions:

Opium

Salt

Salted fish

Spirit

Tea, if Burma ceases to be a party to the International Tea Restriction Scheme as applicable to India.

Goods brought into Burma from places outside British India and Burma without payment of duty in Burma and brought thence into British India.

Comment.

The reciprocal provision for Burma is found in Section 1, Part III, of the Order.

The purpose of these sections is **to prevent the raising of duties on goods in trade between British India and Burma** above those in force immediately before separation.

This limitation does not apply to the exceptions. On these items customs duties may be raised.

The Ruler of an **Indian State** would therefore have to consider whether, by accepting the Order as applicable to his State, he desires to accept the prohibition of an increase of duties by his State on goods imported from or exported to Burma.

He would also, in view of the character of the trade between his State and Burma, consider

whether he should add to the list of excepted articles to which the limitation does not apply, any article which he exports to or imports from Burma.

Section 2.

For purposes of the Sea Customs Act 1878, goods imported from or exported to a customs port or customs aerodrome in Burma shall in British India be deemed to be goods imported from or exported to British India.

Comment.

The reciprocal provision as to Burma is found in Section 2 Part III of the Order.

The purpose of these sections is to provide that goods shipped to or from **customs ports and customs aerodromes** situated in Burma are to be deemed, for the purposes of the Sea Customs Act 1878, as if they were shipped to or from British India and vice versa.

The goods shipped to or from the customs ports or aerodromes of Burma to or from an **Indian State**, which accepts the Order, would likewise be considered as imported from or exported to ports or aerodromes in the State and in British India.

An Indian State which has a customs port or customs aerodrome, will therefore, consider whether for the purposes of the Sea Customs Act 1878, it is desirable that this construction of the Act of 1878 shall be applied to goods exported to the ports and aerodromes of Burma or imported from Burma to the ports and aerodromes of the State.

Section 3.

No prohibition or restriction on import and export with respect to bringing of goods into British India from Burma or from British India into Burma other than those specified in the Schedule annexed, shall have effect in British India.

Comment.

The reciprocal provision as to Burma is found in Section 3 Part III of the Order.

These negative statements exclude prohibitions or restrictions not specified in the Schedule and permit the prohibitions and restrictions listed in the Schedule.

These prohibitions and restrictions are such as the Federal Legislature is authorised to make. Section 19 of the Federal Legislative List (List I

Sch. 7 of the Govt. of India Act, 1935) empowers the Federal Legislature to make laws concerning "Import and export across customs frontiers as defined by the Federal Government."

The authority of the Federal Legislature is, however, defined in Section 99(1) of the Government of India Act 1935, which declares: "Subject to the provisions of this Act, the Federal Legislature may make laws for the whole or any part of British India or for any Federated State."

One of the provisions of the Act to which the authority of the Federal Legislature is subject is contained in Section 160, authorising the Order in Council under consideration.

Therefore, should the Order in Council continue in force after the establishment of the Federation it would limit the scope of action of the Federal Legislature to enact laws with respect to customs frontiers in trade between British India and Burma to the items specified in the Schedule annexed to the Order.

An **Indian State** accepting the Order would be limited to the prohibitions and restrictions enumerated in the Schedule annexed to the Order.

It may be noted, however, that the subject matter of the items in the Schedule appears to be quite comprehensive.

Section 4.

(1) **Duties levied in British India immediately before separation on goods imported into British India from any place outside Burma and India or exported from British India to any such place, may only be reduced or abolished with the previous consent of the Governor of Burma**

Except (a) **Import duties on goods** which at the date of separation are **not produced or manufactured in Burma**, if two months' notice is given by the Governor General of India to the Governor of Burma.

(b) **Import duties on goods on which import duties in Burma have been reduced or abolished** on notice by the Governor of Burma to the Governor General of India on the ground that they are not produced or manufactured in India.

2 Any consent of the Governor General of India to

the reduction or abolition of any duty in Burma shall not be unreasonably withheld.

Comment.

The reciprocal provision as to Burma is found in Section 4 Part III of the Order.

This limitation applies only to goods upon which duties were levied immediately before separation.

The word "India" is defined by Section 311(1) of the Government of India Act 1935, to include all territories of any Indian Ruler.

Therefore, the Imports referred to in Section 4(1), Part II* do not apply to goods imported into British India from an Indian State, as such imports are limited to goods imported from places "outside India," but do include imports into Burma from an Indian State, as the words "outside British India" are used in Section 4(1), Part III.

Reduction of such duties may be made in British India only with the consent of the Governor of Burma and in Burma only with the consent of the Governor General of India, subject in case of a dispute as to whether the consent has been unreasonably withheld, to the decision of the Secretary of State (Sec. 5, Pt. I).

This limitation, prohibiting the reduction or abolition of duties, does not apply in British India to goods which were not produced or manufactured at the date of separation in Burma, and conversely does not apply in Burma to goods which were not produced or manufactured at that date in India, provided the Governor General or Governor gives two months' notice of the intended reduction or abolition. If such a notice has been given by the Governor of Burma as to the reduction or abolition of import duties in Burma, then the duties may also be reduced or abolished in British India and vice versa. The purpose of this section appears to be to prohibit the reduction or abolition of duties except where they are not necessary to protect either British India or Burma against trade competition with each other. If the goods are not being produced or manufactured in Burma, they do not need the protection of import duties and where one of the countries has reduced the duty on the grounds that the goods are not manufactured in the other,

* Note :— The section numbers refer to the Order in Council unless otherwise stated.

that other country may also reduce or abolish the duties on goods coming from abroad.

An **Indian State**, which now levies duties on goods imported from places outside Burma and India, will consider whether it is desirable to come within the scope of this limitation which would prevent the reduction or abolition of duties which were levied immediately before separation on goods imported from or exported to places outside British India and Burma without the consent of the Governor of Burma :

Section 5.

(1) Cotton or lac (including refuse lac) produced in Burma shall in British India be deemed to have been produced in India for the purposes of Section 3 of the Indian Cotton Cess Act 1923, and Section 3 of the Indian Lac Cess Act 1930.

(2) If the cess leviable under either of those Acts is higher on goods exported from British India than the cess leviable in Burma on similar goods exported from Burma, an additional cess equal to the difference may be levied on goods exported from British India into Burma.

(3) If, while this Order is in force, a new cess is imposed in Burma, on the exportation of goods produced or manufactured in Burma to countries outside India and Burma, and any such goods are imported into British India without payment of the cess, then on the re-exportation of these goods to any country outside India and Burma, a cess of the same amount shall be levied in British India.

Comment

The reciprocal provision as to Burma is found in Section 5 Part III of the Order.

An **Indian State** which produces cotton or lac, or which may in the future produce them, will consider whether it is desirable that cotton or lac produced in its State is to be deemed in Burma to have been produced in Burma, or that cotton or lac produced in Burma is in the **Indian State** to be deemed to have been produced in India for the purposes of the sections of the Cotton or Lac Cess Acts cited.

The effect of Sub-division 2 is to equalise these cesses leviable under the Acts cited on trade with Burma. If the cess on goods exported from an **Indian State** is higher than the cess leviable in Burma on similar goods exported from Burma, then the **Indian State** would be authorised to

levy on the goods exported from its State to Burma a cess equal to the difference between the two cesses. In the same way, Burma would be entitled to levy an additional cess on goods exported from Burma to an **Indian State** for the purpose of equalizing any difference between the cesses.

The effect of Sub-division 3 is to equalize any new cesses which may be imposed, while the Order is in force, on exports to countries outside India and Burma.

The effect of acceptance of this sub-division as applicable to an **Indian State** would be:

In case Burma imposed a new cess on the exportation of any goods produced or manufactured in Burma to countries outside India and Burma, and such goods were imported into the **Indian State** without payment of cess, then the **Indian State** would be required to levy a cess equal to the cess of Burma on the re-exportation of these goods to any country outside India and Burma.

So also, by the reciprocal provision, Burma would be required to levy an equalization cess on cess-free goods from an **Indian State** re-exported abroad.

It may be noted that sub-divisions 1 and 2 specifically refer to the Cotton and Lac Cess Acts, whereas sub-division 3 makes no reference to such Acts, but provides for the case of a new cess on the importation "of any goods."

Section 6.

If at any time the duty on goods imported into British India is higher than the duty on such goods in Burma, then on the importation of these goods from Burma a duty may be levied in British India not exceeding the difference between the British India and Burma duties.

Comment

The reciprocal provision as to Burma is found in Section 6 part II of the Order.

The purpose of these sections is to prevent the importation of goods from abroad into British India via Burma, or into Burma via India without payment of the same rate of duties.

The imposition of the additional duty in either British India or Burma is not compulsory but permissive.

An **Indian State** accepting the Order which imposes a higher duty on goods imported than that imposed by Burma is authorised, on the importation of such goods from Burma to the **Indian State**, to levy a duty not exceeding the difference between the two duties. Likewise by the reciprocal provision Burma may impose such a duty on goods imported from an **Indian State**.

Section 7.

If and so long as an excise duty on any goods produced or manufactured in British India is leviable in British India, a countervailing import duty (not exceeding the excise duty) may be imposed on similar goods produced or manufactured in Burma.

Exceptions:

Steel ingots or articles manufactured therefrom, upon which a countervailing duty may be imposed at any rate not exceeding the rate of refund authorised by Section 7 of the Iron and Steel Act 1934.

Goods mentioned in Item 40 of part II of the Seventh Schedule to the India Act.* On such goods the countervailing duty shall not be at a higher rate than that which will afford to goods produced or manufactured in Burma the same advantage as before separation over goods produced or manufactured outside India and Burma.

Comment.

The reciprocal provision as to Burma is found in Section 7, Part III of the Order.

The purpose of these sections is to protect goods upon which excise duties are levied in British India or Burma by tariffs not exceeding the amount of the excise duty.

An **Indian State**, accepting the Order which levies excise duties on goods in the State, would be entitled to levy import duties in a like amount on similar goods produced or manufactured in Burma. Burma would have the same privilege as to goods produced or manufactured in the **Indian State**.

The measure of the tariff is not limited by the amount of the excise duty in the case of the exceptions, namely steel ingots and articles manufactured therefrom and goods mentioned in Item 40 of the Provincial Legislative List (List II, 7th Sch. Govt. of India Act 1935).

* Note:—Copy of the text of the Order submitted to Counsel reads as above. The reference is presumably to List II, Provincial Legislative List of the Seventh Schedule to the Government of India Act 1935.

In the case of steel ingots and articles manufactured therefrom, the rate is not to exceed the rate of refund authorised by Section 7 of the Iron and Steel Duty Act 1934.

In the case of goods mentioned in Item 40 of the Provincial Legislative List, the countervailing duty on goods produced or manufactured in the **Indian State** shall not be higher than that which will afford like Burma products the same advantage over goods produced outside Burma and India as before separation.

The countervailing duty in Burma shall be governed by the same principle.

The goods listed in Item 40 of the Provincial Legislative List to which this provision applies are:

- (a) alcoholic liquors for human consumption;
- (b) opium, Indian hemp and other narcotic drugs and narcotics; non-narcotic drugs;
- (c) medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.

Section 8.

Duties at any rate may be levied in British India on goods imported or exported by land from or to any country outside India and Burma.

In fixing land duties and in their administration due regard shall be had to the principles underlying the Order in Council.

If the import of any goods by land (otherwise than on payment of duties levied on similar goods imported by sea or by air) affects, or is likely to affect seriously, the advantages enjoyed by Burma under this Order, such steps, if any, shall be taken for safeguarding the interests of Burma as local conditions may permit.

Comment

The reciprocal provision as to Burma is found in Section 10, Part III of the Order.

The purpose of these sections is to limit the application of the Order with respect to rates of duty to shipments by sea or air to or from British India or Burma, from or to any country outside India and Burma.

It will be noted that the word "India" is used which includes the Indian States. Therefore, goods

imported to or exported from British India or Burma from or to an **Indian State** would not be deemed goods from or to a country outside India.

Goods arriving at or shipped from seaports or airports in British India, from or to any country outside India and Burma, transported overland to or from an **Indian State**, would be considered as goods transported by sea or air, and not as goods imported or exported by land.

The principles underlying the order, referred to in the second paragraph of the section, are reciprocity between India and Burma in the regulation of their trade with each other and the world, and the securing to Burma of the same trade advantages enjoyed before separation and the advantages established by the Order.

The "steps, if any," mentioned in the third paragraph of the section for safeguarding the interests of Burma or of British India are not defined. Presumably they are to be taken by the Governor General of India or the Governor of Burma in their discretion "as local conditions may permit."

Should an **Indian State** accept the Order, it would be entitled to the same protection as British India.

Section 9.

The Sea Customs Act of 1878 and rules thereunder relating to coasting vessels and goods exported or imported in them shall continue to apply to such goods and vessels plying between ports in India and ports in Burma, as they apply to such goods and vessels plying between ports in India.

Comment

The reciprocal provision as to Burma is found in Section II Part, III of the Order.

The purpose of these sections is to continue the provisions of the Sea Customs Act 1878 and rules thereunder with respect to coasting vessels and to goods in them in the same way as if Burma had not been separated from India.

As the word "India" is used, the section applies to coasting vessels and the goods in them plying between the port of an **Indian State** and ports in Burma.

An **Indian State** which accepts the Order will in its trade with Burma be subject to the provisions

of the Sea Customs Act of 1878 relating to coasting vessels and goods exported or imported in them.

Section 10.

The definitions of "home trade ships" and "coasting ships" in Sections 2 and 37A of the Indian Merchant Shipping Act 1923, and the provisions of Section 218 of that Act (which confers exemptions from the provisions of that Act relating to load lines) shall, notwithstanding separation, have effect in British India as if no distinction existed between India and Burma.

Comment.

The reciprocal provision as to Burma is found in Section 12 Part III, of the Order.

The purpose of these sections is to continue the definitions of "home trade ships," "coasting ships" and load line exemptions of the Merchant Shipping Act 1923, in force in British India and Burma as if there had been no separation between India and Burma.

An **Indian State** accepting the Order would agree that the definitions and provisions referred to should apply to trade between that State and Burma.

Section 11.

(1) Nothing in this part of this Order shall be construed as restricting the powers conferred on the Governor General by Section 23 of the Sea Customs Act 1878 and Sections 3, 4 and 11 of the India Tariff Act 1934, but in exercising them he shall have due regard to the interests of Burma and to the principles underlying this Order, and except where it appears to him unnecessary or impracticable so to do, he shall previously consult the Governor of Burma.

(2) References in the Acts in this paragraph are references to such Acts as were in force on the first day of January, 1934.

Comment.

The reciprocal provision as to Burma is found in Section 13 Part III, of the Order.

The purpose of these sections is to permit the Governor General of India and the Governor of Burma to continue to exercise the powers conferred by the Sea Customs Act 1878, and the India Tariff Act 1934, with due regard to the interests of the other's territory and the reciprocal principles of this Order, and after conference, except where it appears to them unnecessary. The exercise of their powers is, therefore, discretionary.

An **Indian State** accepting the Order would be subject to the exercise of such discretionary powers by the Governor General of India and the Governor of Burma as far as they are applicable to that State.

PART III. PROVISIONS AS TO BURMA.

Part III provides:

Section 1 to 7.

inclusive and

*Section 10
to 13.*

inclusive contain the same provisions with respect to Burma as are provided in Sections 1 to 7 inclusive and 8 to 11 inclusive of Part II with respect to British India.

Comment.

The words "British India" and "Burma" are interchanged wherever appropriate, thereby making the same provisions with respect to Burma as are found in the corresponding sections in Part II of the Order with respect to British India.

The language is the same throughout, except that in Section 4(1) of Part III the words "British India" are substituted for the word "India" found in Section 4(1) Part II; in Section 12 of Part III the words "shall have effect as if no distinction existed between India and Burma" are substituted for the words "shall, notwithstanding separation, have effect in British India as if no distinction existed between India and Burma" found in Section 10 Part II; and in Section 13(2) Part III the words "subject however to any adaptations made therein under Section 149 of the Burma Act" have been added.

The substitution of the words "British India" in Section 4(1) Part III for the word "India" in Section 4(1) Part II has the effect of prohibiting Burma from reducing or abolishing duties on goods exported from Burma to an **Indian State** or imported into Burma from an **Indian State** without the previous consent of the Governor General of India.

Although the language in Section 10 Part II differs from the language in Section 12 Part III, the legal effect is the same.

The additional phrase added to Section 13(2) in Part III is in recognition of the authority conferred by Section 149 of the Burma Act (Section 467 of the Govt. of India Act 1935 as originally printed.) This Section provides: "His Majesty may, by

Order in Council, to be made at any time after passing of this Act, provide that as from such date as may be specified in the Order any law in force in Burma shall, until repealed or amended by the Legislature or other competent authority, have effect subject to such adaptations and modifications as appear to His Majesty to be consequential on the separation of India and Burma."

Section 8.

Rice.—Duty may be imposed in Burma on rice exported to India, not exceeding that imposed on rice exported to other countries.

Comment.

There is no reciprocal section in Part II of the Order with respect to British India.

The purpose of this Section is to permit Burma to raise revenue by duty on export of rice to India, including the Indian States, in the same manner as on export to the rest of the world.

An **Indian State** importing rice from Burma is subject to the effect of this section, whether it accepts the Order or not.

Section 9.

Japanese Cotton Piecegoods.

- (1) If at any time a limit is imposed on the quantity of Japanese cotton piecegoods that may be imported into India, the Governor of Burma shall also by notification impose a limit on the quantity of such goods that may be imported into Burma.
- (2) The limit shall secure that the quantity of such goods imported into Burma from places outside India in each year does not exceed the quantity which was imported into Burma from places outside India during the financial year commencing April 1, Nineteen hundred and thirty-four.
- (3) The notification may impose separate limits with respect to particular classes of such goods which shall not exceed the total quantity above specified.

Comment

There is no corresponding section in Part II of the Order with respect to British India..

The purpose of this section is, in case a limit is imposed on the quantity of Japanese cotton piecegoods that may be imported into India, that the

quantity imported into Burma shall also be limited and that the quantity imported from places outside India shall not exceed the quantity so imported during the financial year 1934.

There may be separate limits on particular classes, but the total from places outside India must not exceed that of 1934.

There is no limitation of the quantity of such goods which may be imported into Burma from India as a whole or from Indian States.

The limitation which may be imposed by British India on the quantity refers to goods "imported into India." This would include goods imported into **Indian States**. Such limitation for the whole of India would be within the authority of the Federal Legislature after the establishment of the Federation; before that time such limitation for all of India would require co-operation between British India and the **Indian States**.

- Section (14)* (1) If His Majesty's Representative for the exercise of the functions of the Crown in its relations with Indian States certifies with respect to any Indian State that the provisions of Part II of this Order will, with any necessary adaptations and modifications, be applied, so far as is reasonably practicable, in and in relation to that State, as they are applied in and in relation to British India, then, unless and until the certificate is revoked by his Majesty's said Representative the provisions of this Part of this Order shall have effect as if references to British India were references to British India and that State.
- (2) A certificate for the purposes of this paragraph may be given before separation by the Governor General of India.

Comment

Although this section of the Order provides that the Order shall apply to Indian States if the Governor General or after separation His Majesty's Representative for the exercise of the functions of the Crown in relation with Indian States so certifies, the Order is not to be construed as authorising His Majesty's Representative to extend its operation so as to include an **Indian State** without the consent of the Ruler. Neither Parliament nor an Order in Council has such power, and His Majesty's Representative could only be authorised to exercise such power in the case of a State which had, by agreement, through Treaty or otherwise, authorised the Crown to regulate its trade.

If there are excise duties in British India or Burma, it permits countervailing tariffs on imports of similar goods produced in the other country, but the rate of duty on **steel ingots** and articles manufactured therefrom is limited by the Iron and Steel Duty Act 1934, and the rate on **goods mentioned in Item 40** of the provincial Legislative List shall afford goods produced in the other country the same advantage as before separation over goods produced abroad (Sec. 7, Pt. II; Sec. 7, Pt. III).

It permits duties at any rate in British India or Burma on goods imported or exported by land from or to any country outside India or Burma, subject to the principles underlying the Order and the safeguarding of the interests of Burma or British India as the case may require (Sec. 8, Pt. II; Sec. 10, Pt. III).

It applies the Sea Customs Act 1878, to vessels and goods in them as if the ports of India and Burma were all Indian ports (Sec. 9, Pt. II; Sec. 11, Pt. III).

It continues the definition "home trade ships" and "coasting ships" and load lines exemptions found in the Indian Merchant Shipping Act 1923 as if there had been no separation (Sec. 10, Pt. II; Sec. 12, Pt. III).

It continues the powers conferred by the Sea Customs Act 1878 and the India Tariff Act 1934 to be exercised by the respective Governors with due regard to the principles underlying the Order and, if practical, after consultation (Sec. 11, Pt. II; Sec. 13, Pt. III).

It permits Burma to impose the same duty on Rice exported to India as on export to the rest of the world (Sec. 8, Pt. III).

It requires the Governor of Burma when a limit is imposed on the quantity of Japanese piecegoods that may be imported into India to impose a limit on imports into Burma, the limit on such imports from outside India to equal the quantity imported in 1934 (Sec. 9, Pt. III).

It provides that if His Majesty's Representative for the exercise of the functions of the Crown in its relations with Indian States certifies that part II of the Order shall apply to an Indian State, then Part III shall have effect as if references to British India were references to British India and the Indian States until the certificate is revoked by His Majesty's Representative (Sec. 14, Pt. III).

CONCLUSIONS.

The Order is of the nature and has the effect of a trade agreement between British India and Burma.

It establishes reciprocal rights and obligations on the part of British India and Burma.

It safeguards in many respects the interests of Burma by continuing the effect of provisions which applied to Burma before separation as if such separation had not taken place.

It requires that in permitting any duties on goods imported or exported by land, steps, if any, shall be taken to safeguard the interests of Burma as well as those of British India.

The Order authorises Burma to impose an export duty on Rice shipped to India (including **Indian States**) as it imposes on Rice shipped to other countries.

The Order is not binding upon any Indian State unless it is accepted by the Ruler as applicable to his State.

The Order however indirectly affects all Indian States.

Although the Order does not directly apply to an Indian State, nevertheless, every Indian State is indirectly affected by the operation of the Order, favourably or unfavourably, in so far as it relates to goods consumed in the State.

There is however no action which can be taken by Indian States with respect to this indirect effect at the present time. In the event of the establishment of the Federation, the Federal Legislature would have jurisdiction in respect of the subject matter covered by the Order and the Representatives of Indian States in the Federal Legislature would have the opportunity to express their views and cast their votes concerning customs frontier regulations and customs duties (Items 19 and 44 of the Federal Legislative List, List I, Sch. 7 of the Govt. of India Act 1935).

Should the Order continue in force after the establishment of the Federation, it would limit the scope of action of the Federal Legislature with respect to trade between British India and Burma as to customs frontier regulations (Item 19) and customs duties (Item 44).

The period during which the Order will remain in force as to British India appears to depend upon the decision of the Governor General of India and the Governor of Burma, but may not be extended beyond twelve months after the three-year term named in the Order (Sec. 7, Pt. I), a total of four years.

The period during which the Order will remain in force as to an Indian State accepting the Order is not fixed. Section 14(1), part III, provides that if His Majesty's Representative certifies that part II of the Order applies to an Indian State, then Part III shall continue in force until the certificate is revoked. But the period during which the Order is to remain in force is provided in Part I of the Order which is not mentioned in Section 14(1) of part III as applicable to an Indian State.

A reasonable construction of this section appears to be that His Majesty's Representative is authorised to issue a certificate including an **Indian State** within the scope of the Order when and so far as the Ruler of such State has accepted the provisions of the Order as applicable to his State.

When the certificate has been given, the provisions of Part III continue in force, "unless and until the certificate is revoked by His Majesty's said Representative." Part III (the Provisions as to Burma) would therefore, if the Order is accepted without modification, have effect in an **Indian State** during the pleasure of His Majesty's Representative.

THE SCHEDULE. PERMISSIBLE LIABILITIES OR RESTRICTIONS.

Provisions or restrictions may be made:

1. For the purposes of public security.
2. On moral or humanitarian grounds.
3. Regarding traffic in arms, ammunition and implements of war. In exceptional circumstances, on other military supplies.
4. For the protection of public health or of animals and plants against disease, insects or harmful parasites.
5. For the protection of national treasures of artistic, historic or archaeological value.
6. To extend to goods produced or manufactured in countries other than India or Burma the regime established within British India or Burma in respect of the production of trade in, and transport and consumption of, native products of the same kind.
7. Arising out of any obligation which India or Burma may have undertaken by virtue of its adherence to any scheme for restricting the production or export of tea, rubber or any other commodity.

BRIEF SUMMARY OF THE PROVISIONS OF THE ORDER.

The Order is authorised by the Government of India and Burma Acts 1935 with a view to preventing undue disturbance of trade and to safeguarding the economic interest of Burma during the period immediately following the separation of

India and Burma (Sec.160, Govt. of India Act 1935 ; Sec 135, Govt. of Burma Act 1935).

It provides that any dispute between the Governor General of India and the Governor of Burma as to the interpretation and application of the Order shall be determined by the Secretary of State (Sec. 5, Pt. I)

It may be continued in force as to British India for a maximum period of four years and with respect to an Indian State accepting the Order so long as it is not revoked by His Majesty's Representative for relations with Indian States (Sec. 7, Pt. I and Sec.14(1) Pt. III),

It prevents the raising of duties on goods in trade between British India and Burma above those in force immediately before separation except on opium, salt, salted fish, spirit and tea (if Burma ceased to be a party to the International Tea Restriction Scheme), and except on duty-free goods from abroad re-shipped from Burma to British India or to Burma from British India (Sec. I, Pt. II; Sec. 1, Pt. III).

It applies the Sea Customs Act 1878 to goods shipped to sea customs ports and customs aerodromes in British India and Burma as if they were in one country (Sec. 2, Pt. II; Sec. 2 Pt. III).

It limits prohibitions or restrictions on goods transported between British India and Burma to those specified in the Schedule annexed to the Order (Sec.3. Pt.II; Sec.3, Pt. III).

It prohibits the reduction or abolishing of duties levied immediately before separation by British India without the consent of the Governor of Burma or by Burma without the consent of the Governor General of India on two months' notice, except duties on goods not produced in the other country at date of separation or on which duties had been reduced or abolished in the other country after such notice (Sec.4,Pt. II; Sec. 4, Pt. III.)

It provides that cotton or lac produced in Burma shall be deemed as produced in India (and vice versa) for the purpose of the Indian Cotton Cess Act 1933 and the Indian Lac Cess Act 1930, and authorises equalizing cesses on the trade between British India and Burma and in case new cesses are imposed on re-exportation abroad (Sec.5, Pt. II; Sec. 5, Pt. III).

It authorises, where the customs duty on any goods imported into British India is higher than the customs duty on such goods imported into Burma, the levying in British India on the importation of such goods re-shipped from Burma, of an equalizing import duty not exceeding the difference between the original customs duties and vice versa as to Burma (Sec. 5, Pt. II; Sec. 6, Pt. III).

The continuance in force of the Order with respect to an Indian State appears to depend upon the discretion of His Majesty's Representative and only as to part of the Order, that is Part III.

It is not clear from the provisions of the Order how long Parts I and II would remain in force with respect to an Indian State. This obscurity may be clarified in the official response of such States as desire to be included within the scope of the Order.

Because of the diversity of conditions in the several Indian States, their different geographical situations, and trade relations, the variety of their products and manufactures, it is not possible to state generally whether or not all the Indian States should signify a desire to come within the scope of the Order.

For the same reasons it is not possible to formulate reservations and modifications which should generally be put forward by all the States to serve and safeguard their interests.

The Indian States are not all equally affected by the Order.

The States most vitally interested are ;

The Maritime States which have customs ports; States which have or which may have aerodromes;

States which impose or may impose customs duties at their frontiers ;

States which produce or manufacture articles specifically mentioned in the Order, such as cotton or lac;

States which are interested in coastwise trade and vessels.

States which impose excise duties.

Without accurate knowledge of the economic conditions in relation to the trade between an Indian State and Burma, or the effect upon that State of the trade between Burma and the rest of India; without expert and detailed knowledge of the commercial life of an Indian State, it is not possible to determine whether that State should be brought within the scope of the Order or to indicate the particular adaptations and modifications it should propose.

The economic conditions which may be affected by the Order, the problems of practical application and revenue returns, are questions for the economists and Ministers of the States concerned and are not within the purview of the enquiry addressed to the Legal Adviser of the Chamber.

In this Opinion the scope of the Order, its meaning and effect have been discussed.

It is only after considering the scope, meaning and effect of the Order in Council in relation to the particular circumstances and conditions existing in the State that a decision can be made whether or not to accept the Order as a whole and, if accepted, what adaptations and modifications may be of advantage to the State.

The Synopsis of and Comments on the Order in Council and the Brief Summary of its Provisions in this Opinion are submitted as an aid to the members of the Chamber of Princes in reaching their decisions.

RECOMMENDATIONS.

Each Indian State in view of its own particular situation with respect to present or prospective trade with Burma, and the effect of several provisions of the Order upon that trade, will determine whether or not to accept the Order as applicable to that State.

An **Indian State** which is not directly affected by the Order and which for that reason is not desirous of specifically extending the scope of the Order to the State, would take no action concerning it.

If a State concludes to accept the Order, it will consider, with reference to its particular conditions, what adaptations or modifications of the Order, if any, are desirable to safeguard its interests.

A State which concludes to accept the Order should make it clear that it is applicable to the State only with the consent of the Ruler and that any adaptations or modifications may only be made with the consent of the Ruler.

Each State which desires to be included within the scope of the Order should place a time limit upon its duration.

To put into effect these recommendations, the following form with respect to acceptance of the Order and adaptations and modifications is suggested for consideration:

"The State of——(insert name of State) expresses its desire to be included within the scope of the agreement in connection with the India and Burma (Trade Regulation) Order 1937 with the following adaptations and modifications.

His Majesty's Representative for the exercise of the function of the Crown in its relation with Indian States shall certify with respect to this State that the provisions of the said Order are applied in and in relation to this State with the

consent of the Ruler thereof and subject to the adaptations and modifications herein stated and to no others, unless and until additional adaptations and modifications are consented to by the Ruler of this State.

The said Order shall continue in force in relation to this State so long as it is in force in British India and no longer and the certificate mentioned in Section 14 Part III of the said Order shall thereupon be revoked."
